No. 75-880

In the Supreme Court of the United States

OCTOBER TERM, 1975

PETER O. ABELES,

Petitioner,

vs.

RICHARD J. ELROD, SHERIFF OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner, Peter O. Abeles, relator-appellant in the court below, prays that a Writ of Certiorari issue to review the judgment of the Illinois Appellate Court, which judgment the Supreme Court of Illinois declined to review.

OPINION BELOW

The opinion of the Illinois Appellate Court, First District, reported at 27 Ill. App. 3d 155, 326 N.E. 2d 443, is set forth in Appendix 1 (App. 1-9). The Illinois Supreme Court declined to review the judgment of the Appellate Court.

JURISDICTION

The judgment of which review is sought was entered March 14, 1975, by the Illinois Appellate Court, First District. A timely petition for rehearing was denied by that court on April 17, 1975. On September 25, 1975, the Supreme Court of Illinois denied a petition for leave to appeal. This petition for a Writ of Certiorari is filed within 90 days of that denial. This Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Without providing petitioner Abeles the opportunity for a hearing or even notice of the demand by Wisconsin for his extradition, the governor of the asylum state, Illinois, issued a rendition warrant ordering Abeles' extradition to Wisconsin.

If extradited to Wisconsin, Abeles faces trial on an amended grand jury indictment which originally charged price fixing of an "article or commodity," but which, after recognition that defendants dealt in a service and not an article or commodity, was substantively amended by the Wisconsin trial court to instead charge—"restraint of trade."

These facts give rise to the following issues:

1. Does this Court's decision in *Munsey* v. *Clough,* 196 U.S. 364 (1905), denying the right of a fugitive to notice and a hearing by the governor of the asylum state prior to issuance of the rendition warrant ordering extradition, conflict with the Court's more recent decisions expanding the concept of procedural due process?

2. Does a judicial amendment of a state grand jury indictment, which changes the nature of the charge, vitiate the indictment as a constitutional basis for extradition?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved herein are Article IV, §2 and the Fourteenth Amendment to the United States Constitution, 18 U.S.C. §3182, Sections 4 and 7 of the Uniform Criminal Extradition Act (Ill. Rev. Stat. 1973, ch. 60, §§21 and 24) and §133.01, Wisconsin Statutes, 1971. The texts of the pertinent constitutional and statutory provisions are reproduced as Appendix 2 (App. 10-12).

STATEMENT OF THE CASE

On February 26, 1973, Peter O. Abeles, a citizen of the State of Illinois, was indicted by the grand jury of Dane County, Wisconsin. Also named in the indictment were Waste Management of Wisconsin, Inc. ("Waste Management"), a corporation engaged in providing the service of hauling and disposing of solid waste matter, and McKinley Standridge, an employee of Waste Management. The grand jury indictment, which is set forth in Appendix 3 (App. 13-20), charged in paragraph 16 that the defendants in violation of Section 133.01 Wisconsin Statutes:

> ". . . did feloneously engage in an unlawful combination and conspiracy intended to restrain competition in the supply or price of an article or commodity which is the subject of trade or commerce in this state."

On April 4, 1973, Wisconsin demanded Abeles' extradition. Nine days later, without opportunity for Abeles to be heard, and without notice to Abeles, the governor of Illinois ordered his extradition. Abeles filed a petition for a writ of habeas corpus contending that his arrest and detention on the rendition warrant issued by the governor of Illinois were illegal and in violation of his constitutional rights in that (a) the Wisconsin indictment failed to sub-

stantially charge a crime, and (b) the governor of Illinois had failed to provide notice and the opportunity for a hearing prior to the issuance of the extradition order.

Standridge and Waste Management, in the meanwhile, had moved the Wisconsin court to dismiss the indictment as not charging a crime under the laws of Wisconsin. They argued that the indictment charged, and the statute outlawed, a restraint of competition in the supply or price of an article or commodity, whereas they were engaged solely in the business of providing a service—waste disposal. The Wisconsin trial judge, on June 4, 1973, ruled that waste removal was indeed a service and not "an article or commodity" as set out in the indictment, and further stated that:

> "The draftsman of the indictment was in error in describing the conspiracy as one to restrain competition in the supply or price of an article or commodity."

Despite these findings, the trial judge went on to deny the motion to dismiss the indictment, choosing to disregard the words "articles and commodities" as "surplusage." The June 4, 1973, opinion and order is set forth in Appendix 4 (App. 21-23).

In Illinois, on September 19, 1973, the Sheriff of Cook County filed a return to Abeles' habeas corpus petition. On October 9, 1973, Abeles filed a memorandum in support of his petition for a writ of habeas corpus arguing, in addition to the points specifically raised in his petition, that the implicit amendment of the indictment by the June 4 order of the Wisconsin trial court was illegal and violated petitioner's due process right to notice of the charges on which he was to be tried.

The Circuit Court of Cook County, on January 31, 1974, denied Mr. Abeles' petition, without opinion, and directed the Sheriff to turn Abeles over to the Wisconsin authorities. Abeles appealed this order to the Illinois Appellate Court urging reversal on the grounds that his constitutional rights were infringed by issuance of the extradition warrant since (a) the Wisconsin indictment failed to substantially charge a crime, (b) the Wisconsin indictment had been illegally amended by the Wisconsin trial judge, and (c) petitioner had not received notice or an opportunity for a hearing before the governor prior to issuance of the extradition order. On March 14, 1975, the Appellate Court rejected each of these contentions and affirmed the denial of the writ of habeas corpus. The Illinois Supreme Court, on September 25, 1975, denied leave to appeal.

On May 27, 1975, the Wisconsin trial court, at the request of the prosecutor, formally amended the grand jury indictment by striking the words "competition in the supply or price of an article or commodity which is the subject of" from the charging language of paragraph 16 of the indictment. An excerpt of the Wisconsin proceedings during which the indictment was formally amended is set forth in Appendix 5 (App. 24-29).

Wisconsin now seeks Abeles' extradition to face trial on this judicially amended grand jury indictment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

This case presents two important Constitutional issues.

First, this Court is asked to consider whether, in view of the conflict between its recent decisions, expanding the concepts of procedural due process, and its 1905 decision in *Munsey* v. *Clough,* 196 U.S. 364, which held that a fugitive is not entitled to a hearing or notice by the governor of the asylum state prior to the order of extradition, it still adheres to the position of the *Munsey* case.

Second, this Court is asked to determine whether a grand jury indictment which has been judicially amended, in contravention of the teachings of *Ex Parte Bain,* 121 U.S. 1 (1887), so as to change the very nature of the crime charged, can be the basis for a constitutionally valid extradition.

I.

THE DECISION BELOW DENIES PETITIONER'S DUE PROCESS RIGHTS TO NOTICE AND A HEARING PRIOR TO THE EXTRADITION ORDER.

The Illinois Appellate Court, relying on this Court's opinion in *Munsey* v. *Clough,* 196 U.S. 364 (1905), denied petitioner the right to a hearing, or even notice, by the asylum state prior to the signing of the extradition order by the governor.

The Illinois opinion, while seemingly observing the rule of *Munsey* v. *Clough,* in reality ignores the recent decisions of this Court which substantially expand the protections of procedural due process into areas of much less significance than the instant case (*e.g.,* school suspension

and seizure of property). This Court should consider whether, in light of its recent decisions, it still adheres to the rule of *Munsey* v. *Clough.*

An extradition order places "a person's good name, reputation, honor or integrity . . . at stake because of what the government is doing to him. . . ." In such a situation "notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971).

The basic requirements of due process should not be ignored merely because habeas corpus is available to review the governor's action. In *Stanley* v. *Illinois,* 405 U.S. 645, 647 (1972), this Court stated that it "has not . . . embraced the general proposition that a wrong may be done if it can be undone." The stigma of arrest on an extradition warrant cannot so easily be removed. More importantly, review of an extradition order in habeas corpus proceedings is not a permissible substitute for notice and an opportunity to be heard by the governor prior to execution of the order, because the standard of review in habeas corpus is narrowly restricted whereas the governor has, by statute, substantial discretion to determine if an extradition order should issue. See, Ill. Rev. Stat. 1973, ch. 60, §§21, 24.

Recent decisions of this Court have recognized and upheld the right to procedural due process in areas which, like extradition, have historically been considered immune from the necessity of meeting due process requirements.

In *Goss* v. *Lopez,* 419 U.S. 565 (1975), this Court held that due process required that a school, prior to a suspension of a student (even if that suspension is only for a 10-day period), must provide the student with notice and an opportunity to be heard. In so holding, this Court noted:

> " 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause [due process] must be satisfied. [Citations] . . . It is apparent that the claimed right of the State to determine unilaterally and without process whether . . . misconduct has occurred immediately collides with the requirements of the Constitution." (419 U.S. at 574-575.)

In *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), summary proceedings which had long permitted seizure of claimed property without notice or hearing were held unconstitutional. The rule of *Fuentes* was reaffirmed in *North Georgia Finishing Inc.* v. *Di-Chem, Inc.,* 419 U.S. 601 (1975). Justice Powell's concurring opinion in *North Georgia Finishing, Inc., supra,* emphasized the need to re-evaluate old precedents in light of recent due process decisions and is particularly apt in the instant case:

> ". . . [T]he Court in the past unanimously approved prejudgment attachment liens similar to those at issue in this case. [Citations.] But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests. See, *e.g., Goldberg* v. *Kelly,* 397 U.S. 274, 263-266 (1970); *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895 (1961)." (419 U.S. at 610)

This Court should review the issue of whether, in light of the developments of the last decade redefining the due process clause of the Fourteenth Amendment, it still wishes to adhere to the outdated language in *Munsey* v. *Clough,* a decision which ignores petitioner's fundamental rights. Such a reconsideration is long overdue.

II.

THE DECISION BELOW UNCONSTITUTIONALLY ALLOWS A JUDICIALLY AMENDED GRAND JURY INDICTMENT TO PROVIDE THE BASIS FOR EXTRADITION.

The essential requisite of a lawful extradition under Art. IV, §2, and 18 U.S.C. §3182, is:

> ". . . that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled. . . ." *Roberts* v. *Reilly,* 116 U. S. 80, 95 (1885).

It is further recognized that a "fugitive" has a right not to be imprisoned or dealt with in disregard of the safeguards provided by the Constitution and the statutes enacted to execute it. *Compton* v. *Alabama,* 214 U.S. 1 (1909); *United States* v. *Meyering,* 75 F.2d 716 (7th Cir. 1934).

In *Ex Parte Bain,* 121 U.S. 1 (1887), this Court set out the rule that a constitutionally mandated grand jury indictment cannot be amended by any means other than representment to the grand jury. This sanctity of grand jury indictments remains a bedrock axiom followed in Illinois, (*People* v. *Clark,* 1 Ill. App. 2d 250, 117 N.E.2d 421 (1st Dist. 1954)) as well as in Wisconsin (*Fink* v. *City of Milwaukee,* 17 Wis. (1863)).

Wisconsin chose to seek an indictment from the Dane County grand jury. Once having chosen that route and having secured an indictment, it should be required, as set out in *Ex Parte Bain,* to return to that grand jury to seek any amendment of the indictment. The fact

that presentment to the grand jury was not originally mandated by the Fifth Amendment does not mean that the state is constitutionally authorized to tamper with a grand jury indictment once returned.

In *United States* v. *Fischetti,* 450 F.2d 34 (5th Cir. 1971), the government sought and obtained, although it was not constitutionally required, a grand jury indictment charging certain misdemeanors. Subsequently the trial court amended the indictment. Although the government could have originally proceeded by way of an information which could have been judicially amended, the court held that:

> ". . . [T]he Government chose to present the case to the grand jury and secure an indictment. Having so elected, it is bound by the principles governing indictments. United States v. Lippi, D. Del. 1961 193 F. Supp. 441, 443" (450 F.2d at 39).

This same principle should apply to the instant situation.

The indictment against Abeles, as returned by the Dane County grand jury, attempted to charge the crime of price-fixing of articles or commodities. That charge failed, however, because defendants were engaged in the provision of a service—waste removal—not in the supply of an "article or commodity." Price-fixing of services is not a crime established by Wisconsin statute. 1908 Opinion Attorney General (Wisconsin) 495, 496; *State* v. *LeSage,* 1950-51, CCH Trade Cases, paragraph 62,592 at p. 63,741. See also *State* v. *Milwaukee Braves,* 31 Wis.2d 699, 714-717, 144 N.W. 2d 1, 8-10 (1966).

In an effort to save the indictment, the Wisconsin trial court chose to disregard the charging language of paragraph 16 of the indictment and substituted the unspecified charge of "restraint of trade". Subsequently, the trial court, at the state's request, formally amended the grand jury's indictment by deleting most of the original charging language of paragraph 16 ("competition in the supply or price of an article or commodity which is the subject of") and leaving only the charge of "an unlawful combination and conspiracy intended to restrain trade or commerce in this state."

An indictment so defective as to wholly fail to charge the elements of a crime under the law of the demanding state cannot support extradition under Article IV, §2 of the Constitution. *Pierce* v. *Creecy,* 210 U.S. 387 (1908). If extradited, Mr. Abeles would be forced to trial on an illegally amended indictment which is no charge at all. The Wisconsin indictment as returned by the grand jury was clearly defective. The judicial amendment confirms this, and by its very existence renders the indictment a nullity under the rule of *Ex Parte Bain.** Such an indictment does not meet the constitutional requirements of Article IV, Sec. 2 as the charge of a crime.

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* As a practical matter the indictment fails further to provide notice whether Abeles is charged under sentence one or sentence two, or either sentence, of Wisconsin Statutes, §133.01, in clear violation of the due process clause of the Fourteenth Amendment. *Cole* v. *Arkansas,* 333 U.S. 196 (1948); *Smith* v. *O'Grady,* 312 U.S. 329 (1941); *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934); *Powell* v. *Alabama,* 287 U.S. 45, 68 (1932).

CONCLUSION

Petitioner, Peter O. Abeles, submits that the important constitutional issues raised herein should be reviewed by this Court, and respectfully prays that a Writ of Certiorari issue to review the Illinois Appellate Court's judgment of March 14, 1975.

Respectfully submitted,

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December 22, 1975

APPENDIX

APPENDIX 1

OPINION OF THE APPELLATE COURT

Mr. Justice Sullivan delivered the opinion of the court:

This appeal results from the quashing of a writ of habeas corpus by which relator-appellant, Peter Abeles, a resident of Illinois, sought to challenge the validity of an extradition order returning him to Wisconsin to answer an indictment in that state. Abeles contends (1) the indictment fails to charge a crime under Wisconsin law; (2) a Wisconsin trial judge illegally amended the indictment; and (3) due process required that he be given notice and an opportunity to be heard before the Governor of Illinois ordered his extradition.

On February 28, 1973, a Wisconsin Grand Jury for Dane County indicted Abeles for the offense of conspiring to restrain trade, in violation of Section 133.01(1) and (3),[1]

[1] That section provides:

(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal

(footnote continued)

Wisconsin Statutes, 1971. Also named in the indictment were Waste Management of Wisconsin, Inc., of which Abeles was a vice president and its general manager in Dane County from 1969 through December 1972, and McKinley Standridge, an employee of Waste Management and its general manager in said county from December 1972 through the date of the indictment. In essence, they were charged with conspiring with others to submit collusive, noncompetitive or rigged bids on solid waste removal contracts in Dane County. Specifically, the indictment in pertinent part charged:

> "16. Commencing in the year 1970, the exact date being unknown to the Grand Jury, and continuing thereafter until at least February, 1973, in the County of Dane and State of Wisconsin, the defendants and co-conspirators named herein did feloniously engage in an unlawful combination and conspiracy intended to restrain competition in the supply or price of an article or commodity which is the subject of trade or commerce in this state.
>
> 17. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action between the defendants and co-conspirators to submit collusive, noncompetitive or rigged bids on solid waste removal to various public

(footnote continued)

> or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000.
>
> * * *
>
> (3) Whoever violates sub. (1) may be fined not more than $5,000 or imprisoned not more than 5 years or both.

> and private entities located in Dane County and to allocate solid waste removal jobs in Dane County among themselves."

Paragraph 18 set forth certain conduct which allegedly was in furtherance of the conspiracy, as follows:

> "a. Attempted to secure agreements from other solid waste haulers whereby competitors would not take each others accounts and would call the solid waste hauler then servicing the account to obtain a price to quote, and would exchange information about prices to be bid on public jobs which were required to be bid secretly and competitively.
>
> b. During November 1971 and December 1971 continuing through February 1973, the exact dates being unknown to the Grand Jury, agreed not to take each others' accounts and agreed to effectuate the agreement by calling the solid waste hauler then servicing the account to obtain a price to quote.
>
> c. Personally met to designate or attempt to designate the solid waste hauler who was to submit the low bid on public and private contracts being let on secret and on negotiated bid bases and engaged in a similar pattern of conduct by use of the telephone to accomplish or attempt to accomplish the same purpose.
>
> d. Submitted noncompetitive bids and quotes on public and private contracts in agreement with other solid waste haulers bidding or quoting on the same project."

After reciting the effects of the combination and conspiracy, the indictment then concluded:

> "The offense charged and the acts stated herein are contrary to sec. 133.01(1) and (3) of the Wisconsin Statutes in such case made and provided and against the peace and dignity of the State of Wisconsin."

In Wisconsin, Abele's co-defendants made a motion to dismiss the indictment as failing to charge a crime. They contended that the indictment charged a conspiracy to

violate the second sentence of sec. 133.01(1) in that they did feloniously combine "to restrain competition in the supply or price of an article or commodity," and they argued that Waste Management provided a service of waste disposal and not a sale of an "article or commodity." The Wisconsin Supreme Court had held that the second sentence did not apply to the rendition of services. (*State* v. *Milwaukee Braves,* 31 Wis. 2d 699, 144 N.W.2d 1, *cert. denied,* 385 U.S. 990, 87 S.Ct. 595, 17 L.Ed.2d 451.) However, Judge Jackman of the Dane County Circuit Court denied the motion to dismiss, stating:

> "We are of the opinion that the particulars set forth in paragraphs 17 and 18 do clarify the meaning of the indictment so that the defendants cannot mistake what acts plaintiff claims were unlawful. The draftsman of the indictment was in error in describing the conspiracy as one to restrain competition in the supply or price of an article or commodity. But he did go on to describe the offense as one of bid rigging for service. We are of the opinion that the defect is a formal one which does not prejudice either of the defendants because they are fully informed of the precise character of the offense charged. Sec. 971.26.[2] The error is one of description, which is clarified and made quite certain in the following paragraphs, so that the descriptive error is quite apparent. An indictment is sufficient if it specifies with clarity the act or acts constituting the offense and the section of the statute violated. We are of the opinion that the indictment is sufficient in the light of Sec. 971.26.
>
> It is our opinion that the indictment is a sufficient allegation of an offense under the first sentence of Sec. 133.01 standing alone. Defendants, however, contend that that sentence is modified by the second sentence which applies only to trade in articles and commodities. In *State* v. *Milwaukee Braves,* 31 Wis.2d 699, 716, it is said:
>
> 'we conclude that the insertion of the second sentence in 1921 did not limit the broad language of the first or third sentences to the types of combination described in the second.' We think this answers defendants' contention that no offense has been stated.
>
> For the reasons above stated it is hereby ordered that defendants' motion to dismiss the indictment for failure to allege an offense is denied."

[2] Sec. 971.26 provides:

"No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."

Following the denial of this motion, the State of Wisconsin began extradition proceedings for the return of Mr. Abeles.

OPINION

The question of extradition is of constitutional significance. In the instant case, Illinois has an interest in protecting its citizens while Wisconsin has an interest in enforcing its laws. Cognizant of this conflict, the founding fathers provided in the U.S. Constitution, section 2, clause 2 of Article IV, as follows:

> "A person charged in any State with Treason, Felony or other Crime who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

Since this provision is not self-executing (*Kentucky* v. *Dennison,* 65 U.S. (24 How.) 66, 104, 16 L.Ed. 717, 728), Congress enacted a statute (62 Stat. 822, 18 U.S.C.A. 3182) providing for extradition where the executive authority of the demanding state presents to the executive authority of the asylum state "a copy of an indictment

• • • charging the person demanded with having commited treason, felony, or other crime • • •."

Illinois has adopted the Uniform Criminal Extradition Act (Ill. Rev. Stat. 1973, ch. 60, pars. 18-49), which provides in Sec. 20 that the indictment must "substantially charge the person demanded with having committed a crime under the law of that state."

Abeles's first contention is that he was not substantially charged with a crime under the laws of Wisconsin.[3] Specifically, he maintains that the indictment charges price-fixing of an article or commodity while Waste Management provided only a service. Essentially, his argument reiterates that posed by his co-defendants in their motion to dismiss before Judge Jackman in Wisconsin.

The scope of the judicial hearing in an extradition case was thoroughly considered and discussed in *People ex rel. Gilbert* v. *Babb,* 415 Ill. 349, 114 N.E.2d 358. There, in answer to appellant's contention that it was incumbent upon the courts of the asylum state to hear and determine the validity of an indictment returned in the demanding state, the court reasons as follows, at page 355:

> "The scope of the extradition inquiry and the issues which are presented by it have been resolved by many decisions of the Supreme Court of this nation and,

[3] It has been stated that in an extradition proceeding the only matters open for review are (1) whether the accused is substantially charged with a crime under the laws of the demanding state; (2) whether the person in custody is the person charged; and (3) whether he is a fugitive from justice. (*People ex rel. Kubala* v. *Woods,* 52 Ill.2d 48, 284 N.E.2d 286; *People ex rel. Goldstein* v. *Babb,* 4 Ill.2d 483, 123 N.E.2d 639; *cert. denied,* 349 U.S. 928.) A fourth element, whether the papers are regular in form, was iterated by the court in *People ex rel. Levin* v. *Ogilvie,* 36 Ill.2d 566, 224 N.E. 2d 247. In any event, here the only question in dispute is the first.

> in essence, the established rule is that the court may determine whether a crime has been established in the demanding State, whether the fugitive in custody is the person so charged, and whether the fugitive was in the demanding State at the time the alleged crime was committed.
>
> • • •
>
> In *Drew* v. *Thaw,* 235 U.S. 432, 59 L.ed. 302, the court had this to say about the scope of the *habeas corpus* proceeding: 'In extradition proceedings, even when, as here, a humane opportunity is afforded to test them upon habeas corpus, the purpose of the writ is not to substitute the judgment of another tribunal upon the facts or the law of the matter to be tried. The Constitution says nothing about habeas corpus in this connection, but peremptorily requires that upon proper demand the person charged shall be delivered up to be removed to the state having jurisdiction of the crime. • • • The technical sufficiency of the indictment is not open.' "

Whether the attack upon an indictment is addressed to the "technical sufficiency" of the charge of crime or constitutes a complaint that the indictment fails to "substantially charge" a crime is sometimes a difficult question. Here, it is contended that the facts alleged in the indictment do not, under Wisconsin law, constitute a crime since they fail to show a conspiracy to restrain competition in the supply or price of an article or commodity. In *Pierce* v. *Creecy,* 210 U.S. 387, 28 S.Ct. 714, 52 L.Ed. 1113, the Supreme Court, while holding that an indictment sufficiently charged a crime for purposes of extradition, at the same time recognized that:

> "[A]n objection which, if well founded, would destroy the sufficiency of the indictment, as a criminal pleading, might conceivably go far enough to destroy also its sufficiency as a charge of crime." 210 U.S. 387, 404.

We do not believe, however, such an objection has been presented here. It appears to us that the facts alleged in

the indictment are sufficient to substantially charge defendant with violation of sec. 133.01(1) and (3) of the Wisconsin Statutes, as alleged in the conclusion of the indictment. We are persuaded by the opinion of Judge Jackman of the Wisconsin Circuit Court that the defect in the indictment is merely a formal one and that there is a sufficient charge of a violation of the first sentence of sec. 133.01(1), which reads as follows: "Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal," in that it specifies with clarity the act or acts constituting the offense and the section of the statute violated. As stated in 31 Am.Jur.2d, Extradition, Sec. 36:

> "To support the extradition of an alleged fugitive from justice, the affidavit or indictment accompanying the demand must substantially charge the accused with the commission of a crime against the laws of the demanding state. While it need not conform to the technical rules, a pleading is not sufficient if it is so indefinite as to fail to inform the accused of the nature of the charge against him. However, since the sufficiency of an indictment or affidavit must be tested in accordance with the laws of the demanding state, extradition will not generally be denied on the ground of insufficiency of the charge of crime where the question might reasonably be decided the other way by the courts of that state." (Footnotes omitted.)

No more persuasive case on point could be found than the decision of the Wisconsin trial court sustaining the indictment against the same objection of insufficiency raised by Abeles's co-defendants. Since it reasonably appears the question might be decided against relator in Wisconsin, we cannot say the indictment is insufficient for purposes of extradition.

Nor are we persuaded by defendant's second contention that Judge Jackman's construction of the indictment constituted an illegal amendment. Even if so construed, this

objection would not be open for review in an extradition hearing, since it is addressed merely to the technical sufficiency of the indictment or its form. *Pierce* v. *Creecy, supra; People ex rel. Kubala* v. *Woods, supra.*

Finally, we believe the objection that due process required a hearing by the Governor before extradition is effectively disposed of by *Munsey* v. *Clough,* 196 U.S. 364, 25 S.Ct. 282, 49 L.Ed. 515, where the following appears at page 372:

> "The proceedings in matters of this kind before the governor are summary in their nature. The questions before the governor, under the section of the Revised Statutes, above cited,[4] are whether the person demanded has been substantially charged with a crime, and whether he is a fugitive from justice. The first is a question of law and the latter is a question of fact, which the governor, upon whom the demand is made, must decide upon such evidence as is satisfactory to him. Strict common law evidence is not necessary. The statute does not provide for the particular kind of evidence to be produced before him, nor how it shall be authenticated, but it must at least be evidence which is satisfactory to the mind of the governor. *Roberts* v. *Reilly,* 116 U.S. 80, 95. The person demanded has no constitutional right to be heard before the governor on either question, and the statute provides for none. To hold otherwise would in many cases render the constitutional provision, as well as the statute passed to carry it out, wholly useless."

See also, *Lee Won Sing* v. *Cottone* (D.C. Cir. 1941), 123 F.2d 169; *Horne* v. *Wilson* (E.D. Tenn. 1969), 306 F.Supp. 753.

For these reasons, the order quashing the writ of habeas corpus is affirmed.

Affirmed.

DRUCKER, J. and LORENZ, J. concur.

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[4] Former section 5278, presently 62 Stat. 822, 18 U.S.C.A. 3182.

APPENDIX 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Art. IV, §2, United States Constitution

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

Fourteenth Amendment, §1, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §3182

§ 3182. *Fugitives from State or Territory to State, District or Territory*

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or

Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

Ill. Rev. Stat. 1973, ch. 60, §§21, 24

§ 21. *Governor may investigate case*

When a demand shall be made upon the Governor of this State by the Executive Authority of another state for the surrender of a person so charged with crime, the Governor may call upon the Attorney-General or any prosecuting officer in this State to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

. . .

§ 24. *Issue of Governor's warrant of arrest— Its recitals*

If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

Wis. Stat., 1971, §133.01(1) and (3)

(1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade. Every person, corporation, copartnership, trustee or association who shall either as principal or agent become a party to any contract, combination, conspiracy, trust, pool or agreement herein declared unlawful or declared to be in restraint of trade, or who shall combine or conspire with any other person, corporation, copartnership, association or trustee to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than $100 nor more than $5,000.

. . .

(3) Whoever violates sub. (1) may be fined not more than $5,000 or imprisoned not more than 5 years or both.

APPENDIX 3

WISCONSIN GRAND JURY INDICTMENT

The jurors of the Grand Jury for the January, 1973, Term of the Circuit Court for Dane County, Wisconsin, being good and lawful men and women citizens of the County of Dane and State of Wisconsin, being duly chosen, selected, summoned, impaneled, sworn and charged to inquire for the State of Wisconsin, in and for the body of said County of Dane, in the name and by order of the State of Wisconsin, do upon their oaths present:

I.

DEFINITIONS

1. SOLID WASTE. Solid waste is garbage, refuse and all other discarded or salvageable material, including waste material resulting from industrial, commercial and agricultural operations, and from domestic use and public service activities, but does not include solid or dissolved material in waste water effluents or other common water pollutants.

2. GARBAGE. Garbage is discarded material resulting from the handling, processing, storage, preparation, serving and consumption of food.

3. REFUSE. Refuse is combustible and noncombustible discarded material including, but not limited to trash, rubbish, paper, wood, metal, glass, plastic, rubber, cloth, ashes, litter and street rubbish, sewage treatment residue, industrial wastes, dead animals, mine tailings, gravel pit and quarry spoils, toxic and hazardous wastes, and material and debris resulting from construction or demolition.

4. SALVAGEABLE MATERIAL. Salvageable material is discarded material no longer of value as intended, but which is stored or retained for salvage, sale or future reuse.

5. SOLID WASTE REMOVAL. Solid waste removal is the collection and transportation of solid waste for disposal purposes.

6. SOLID WASTE HAULER. A solid waste hauler is a private person engaged in solid waste removal.

7. PERSON. A person is an individual, group of individuals, partnership, firm, corporation or association.

II.

THE DEFENDANTS

8. Waste Management of Wisconsin, Inc. is hereby indicted and made a defendant herein. Waste Management of Wisconsin, Inc. is organized and exists under the laws of the State of Wisconsin and has its principal place of business in Brookfield, Wisconsin. During the period of time covered by this indictment Waste Management of Wisconsin, Inc. was engaged in the business of hauling solid waste and disposing of solid waste in Dane County under the name of City Disposal Company. Waste Management of Wisconsin, Inc., will be referred to hereafter in this indictment as "City Disposal."

9. Peter O. Abeles is an individual residing at 1441 Hemlock Knoll Terrace, Northbrook, Illinois and is hereby indicted and made a defendant herein. During all or part of the period covered by the indictment Peter O. Abeles was the vice-president of Waste Management of Wisconsin, Inc. From the time City Disposal began operations as a solid waste hauler in Dane County in 1969 through December, 1972 Peter O. Abeles was general manager of the operations of the business.

10. McKinley "Stan" Standridge is an individual residing at 6110 South Hill Drive, Madison, Wisconsin and is hereby indicted and made a defendant herein. During all or part of the period covered by the indictment, McKinley Standridge was an employee of City Disposal and from December, 1972 through the date of this indictment was general manager of City Disposal operations in Dane County.

11. Whenever in this indictment reference is made to any act, deed or transaction by City Disposal, such allegation shall be deemed to mean that the said defendant engaged in said act, deed or transaction by or through its officers, directors, agents, employees, or representatives, including the individual defendants named herein, while they were actively engaged in the management, direction, control or transaction of corporate or co-partnership business or affairs.

III.

CO-CONSPIRATORS

12. Each of the named below engaged in solid waste removal during all or part of the period of time covered in the indictment. They are not named as defendants in this indictment, but participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof:

Tony Pellitteri Trucking Service Inc.
Jerry Beecher, d/b/a Doug's Sanitation Service

IV.

TRADE OR COMMERCE

13. The City of Madison is responsible for the removal of solid waste in the City of Madison from all single family dwellings and from all multiple dwelling resident and commercial establishments who were being serviced by the City of Madison as of September 1, 1967. The City of Madison picks up only once a week and only when the solid waste is placed at curbside.

14. When solid waste removal is required by the State or Federal Government or divisions thereof, secret competitive bids are often required by State or Federal law by municipal ordinance, or by other agency regulation and are solicited directly from solid waste haulers. After the tendering of these bids by the solid waste hauler, the public authority soliciting the bids opens them, and awards the solid waste removal work to the low qualified bidder, who is then obligated to proceed with the work designated.

15. When solid waste removal is required by private persons, corporations, partnerships, associations and other organizations or their appointed agents, bids frequently are solicited directly from solid waste haulers on a negotiated basis. After the tendering of such bids by the solid waste haulers, the solid waste removal work is awarded to a hauler. Such work may be awarded either under a formal contract specifying time periods, rates, service to be performed, etc. or may be awarded on an informal basis for an indefinite period of time for so long as both parties are satisfied with the other's performance.

V.

OFFENSE CHARGED

16. Commencing in the year 1970, the exact date being unknown to the Grand Jury, and continuing thereafter until at least February, 1973, in the County of Dane and State of Wisconsin, the defendants and co-conspirators named herein did feloniously engage in an unlawful combination and conspiracy intended to restrain competition in the supply or price of an article or commodity which is the subject of trade or commerce in this state.

17. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action between the defendants and co-conspirators to submit collusive, noncompetitive or rigged bids on solid waste removal to various public and private entities located in Dane County and to allocate solid waste removal jobs in Dane County among themselves.

18. For the purpose of effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things for which they combined and conspired to do, including, among other things, the following:

a. Attempted to secure agreements from other solid waste haulers whereby competitors would not take each others accounts and would call the solid waste hauler then servicing the account to obtain a price to quote, and would exchange information about prices to be bid on public jobs which were required to be bid secretly and competitively.

b. During November 1971 and December 1971 continuing through February 1973, the exact dates being unknown to the Grand Jury, agreed not to take each others' accounts and agreed to effectuate the agreement by calling

the solid waste hauler then servicing the account to obtain a price to quote.

c. Personally met to designate or attempt to designate the solid waste hauler who was to submit the low bid on public and private contracts being let on secret and on negotiated bid bases and engaged in a similar pattern of conduct by use of the telephone to accomplish or attempt to accomplish the same purpose.

d. Submitted noncompetitive bids and quotes on public and private contracts in agreement with other solid waste haulers bidding or quoting on the same project.

VI.

EFFECTS OF THE COMBINATION AND CONSPIRACY

19. The aforesaid combination and conspiracy had the following effects among others:

a. Various public and private entities have been deprived of competitive bids and quotes on solid waste removal in Dane County.

b. Competition between and among the defendants and co-conspirators was restrained and prevented on solid waste removal jobs in Dane County.

20. The aforedescribed combination and conspiracy attempted to affect or did affect the solid waste removal bids or quotes for the following entities among others:

Account	Address	Date
Forest Products Lab	Walnut	May 1972
University Hospital	1300 Univ. Ave.	May 1972
Army Reserve Centers		May 1972
V.A. Hospital		May 1972
Rennebohm's		Feb 1972
Marschall Div. - Miles Labs Inc.		Feb 1972
Jose's Three Sisters	Regent St.	1971
Woolworth's	2 West Mifflin	Jan or Feb 1972
S.S. Kresge	27 E. Main St.	1972
Farmer's Ins. Bldg.		March 1972
Ponderosa Steak House		March 1972
Chandler's Shoe Store	702 N. Midvale	April 1972
Fine Arts Checks Inc.	4677 W. Beltline	May 1972
Murray Meat Co.	905 Jonathon Dr.	May 1972
K-Mart East	3801 E. Wash.	Sept. 1972
National Mutual Benefit	119 Monona Ave.	Jan. 1973
Consumers Coop Pharmacy East & West		
Par Crest Mobil		Dec. 2, 1971
Swiss Colony (East Towne)	20 East Towne Mall	Dec. 2, 1971
Eggiman Motors	1813 W. Beltline Hwy.	Dec. 7, 1971
Firestone Retread	710 W. Wingra Dr.	Dec. 9, 1971
Carroll Hall		Dec. 10, 1971
Hoffman House Food Prod., Inc.	1055 E. Wash. Ave.	Dec. 15, 1971
Taco-Techo	410 State St.	Dec. 21, 1971
El Rancho		1972
Fish Building Supply, Inc.	Pleasant View Rd. Middleton	1972
Sentry Store	Mineral Pt. Road	1972
Humiston Keeling & Co.	849 E. Wash. Ave.	1972
Sunshine Super Market	1402 Williamson	1972
United Bank Bldg.	222 W. Wash. Ave.	1972
Pyare Square Bldg.	University Ave.	1972
Cuba Club	3416 Univ. Ave.	1972
St. Mary's Hosp.		1972
Left Guard		1972
Fedele's Tire	2413 S. Park St.	Dec. 27, 1971
Manchesters		Jan 1-7, 1972
Hoffman Chemical & Supply Co.,Inc.	1206 Ann	Jan. 3, 1972
Del Farm	Nakoma Plaza	Jan. 6, 1972
3 F Laundry	1509 Emil St.	Jan. 6, 1972
Pino's Restaurant & Bar	3 N. Park St.	Jan. 10, 1972
Monona Shores Apts.	1513 Simpson	Jan. 10, 1972
Fauerbach Fine Foods, Inc.	1864 Monroe	Jan. 12, 1972
Refrographics		Jan. 12, 1972
McGilligan Carpet Service		July or Aug. 1972
Congress Bar & Lounge		Feb, March 1972
American Family Ins.		April, May 1972
A & P		1970
Holmes Tire Co.		1970
Mark Hoyt Mill Works		May 11, 1972

VII.

JURISDICTION AND VENUE

21. The aforesaid combination and conspiracy was carried out within the jurisdiction of the Court in Dane County, Wisconsin, in part within six-years preceding the return of this indictment.

The offense charged and the acts stated herein are contrary to sec. 133.01 (1) and (3) of the Wisconsin Statutes in such case made and provided and against the peace and dignity of the State of Wisconsin.

This is to certify that the Grand Jury has found this indictment to be a True Bill this 28th day of February, 1973.

/s/ *Frederic W. Ahrens*
Frederic W. Ahrens, Foreman of the Grand Jury in and for the County of Dane, Wisconsin

Robert W. Warren
Attorney General of Wisconsin
/s/ *Paul J. Gossens*
Paul J. Gossens
Assistant Attorney General of Wisconsin

/s/ *Marvin I. Strawn*
Marvin I. Strawn
Assistant Attorney General of Wisconsin

APPENDIX 4

DECISION AND ORDER OF WISCONSIN TRIAL COURT, DATED JUNE 4, 1973

The complaint very clearly alleges that the conspiracy "• • • intended to restrain competition in the supply or price of an article or commodity • • •." It then goes on to allege that this was achieved by agreement to submit rigged bids and by allocation of jobs. The defendants take the position that waste removal is a service, not an article or commodity. Plaintiff takes the position that, reading the indictment as a whole, it is not material that waste removal may not be a service, since the allegations do show a restraint of trade. Plaintiff also contends that waste removal is a commodity.

A combination or conspiracy to fix prices or restrain trade in a service industry is illegal under the Sec. 3 of the Sherman Act which is almost identical with the first sentence of Sec. 133.01. U.S. v. Nat. Asso. R.E.B., 339 U.S. 485, 94 L Ed 1007, and cases cited therein. The allegations of paragraph 17 of the indictment, if true, would constitute a violation of Sec. 133.01(1), particularly the first sentence. U.S. v. Pa. Refuse Removal Asso., 242 F.S. 794, 357 F 2d 806.

Plaintiff's contention that waste removal is a "commodity" or "article" is not, in our opinion, sound. Plaintiff relies upon McKinley Tel. Co. v. Cumberland Tel. Co., 152 Wis 357, 362. It might also have added Bowles v. Wheeler, 152 F 2d 34 (Log booming and rafting); Burns v. Donahue, 79 F S 107 (storage); Beechley v. Mulville, 70 NW 107 (insurance); Hamilton Mfg. Co. v. Mass., 6 Wall. 632, 18 L Ed 904. Defendants have cited numerous cases to the contrary.

We think that, as used in Sec. 133.01(1), "article" is used in the sense of a particular commodity, a thing for sale, as defined by Webster. And commodity means an article that is bought and sold, and not in the obsolete sense of a convenience or advantage. We are of the opinion that the words article and commodity should be given their generally accepted meaning of tangible personal property as used in commerce, as, for instance, furniture or corn.

It is unfortunate that the indictment even mentioned article or commodity, as it was not necessary, in our belief. Any attempt to equate the service of scavengers with those who deal in goods seems rather far fetched to us and we do not accept such a construction.

We are of the opinion that the particulars set forth in paragraphs 17 and 18 do clarify the meaning of the indictment so that defendants cannot mistake what acts plaintiff claims were unlawful. The draftsman of the indictment was in error in describing the conspiracy as one to restrain competition in the supply or price of an article or commodity. But he did go on to describe the offense as one of bid rigging for service. We are of the opinion that the defect is a formal one which does not prejudice either of the defendants because they are fully informed of the precise character of the offense charged. Sec. 971.26. The error is one of description, which is clarified and made quite certain in the following paragraphs, so that the descriptive error is quite apparent. An indictment is sufficient if it specifies with clarity the act or acts constituting the offense and the section of the statute violated. We are of the opinion that the indictment is sufficient in the light of Sec. 971.26.

It is our opinion that the indictment is a sufficient allegation of an offense under the first sentence of Sec. 133.01 standing alone. Defendants, however, contend that that sentence is modified by the second sentence which applies only to trade in articles and commodities. In State v. Milwaukee Braves, 31 Wis 2d 699, 716, it is said: "• • • we conclude that the insertion of the second sentence in 1921 did not limit the broad language of the first or third sentences to the types of combination described in the second." We think this answers defendants' contention that no offense has been stated.

For the reasons above stated, it is hereby

ORDERED: that defendants' motion to dismiss the indictment for failure to allege an offense is denied.

Dated June 4, 1973

By The Court
W. L. Jackman
Judge

APPENDIX 5

EXCERPT OF MAY 27, 1975, PROCEEDINGS AMENDING INDICTMENT

EXCERPT OF PROCEEDINGS

Hon. Norris Maloney, Circuit Judge, presiding.

Plaintiff: By Marvin I. Strawn,
Assistant Attorney General.

Defendants: By Robert H. Friebert and D. Jeffrey Hirschberg, Attorneys.

The Court: * * * And I likewise deny any and all motions to dismiss the indictment on the grounds that there is no offense unless there is a commodity involved. * * *

Mr. Friebert: Your Honor, may I ask a question regarding your last ruling?

The Court: Yes.

Mr. Friebert: Are we charged with violating the first or second sentence of 133.01, because the indictment uses the language of the second sentence.

The Court: I will clarify that for you. I will here and now declare that Judge Jackman erred when he refused the Attorney General's motion to amend the indictment by striking out the reference to commodities and articles. I rule merely that he erred. If there is a new motion, I will not make the same error.

Mr. Strawn: Judge, the State at this time would like to—

The Court: I will call to your attention—I may call to your attention that I am somewhat of an expert on this question of amendments to Informations, having had the last case in the Supreme Court on the subject. Is the defense counsel aware of *Wagner* v. *State*?

Mr. Friebert: No, I am not. If the Court said that involved an Information, we think that is different than an indictment.

The Court: Well, it may be, but let me read you the basis of the decision. 971.31(8) (looking at Statutes) which is part of the basis for the ruling of the Supreme Court in the *Wagner* case. The *Wagner* case involved Informations, but the Supreme Court discusses the law in its entirety. They don't limit their discussion to just what was in that particular case.

That particular case involved an Information in which there was one sale which involved a combination of cocaine and MDA, amphetamine, and the District Attorney attempted to draw two Informations. He drew one, but he didn't specify that it contained both commodities. I allowed him to amend the Information to set forth that MDA was a derivative of amphetamine, and that the substance included cocaine. Then he tried to have two amendments, wanted to break it into two charges, and I refused that. I said there is only one sale, and there is only one offense.

The Supreme Court said I was right, and they quoted 971.31(8). 971 is entitled: "Any motion which is capable of determination without the trial of the general issue may be made before trial," and it goes on and takes up various subject matters in all of the preceding seven subsections, and this subsection says: "No complaint, indictment, information, process, return or other proceedings shall be

dismissed or reversed for any error or mistake where the case and the identity of the defendant may be readily understood by the court; and the court may order an amendment curing such defects."

These are on motions before trial, and it is cited with approval in *Wagner*.

Mr. Strawn: Judge—

Mr. Friebert: Excuse me, what is the volume?

The Clerk: Volume 60.

Mr. Strawn: The State is prepared to make an amendment at this time.

The Court: Wait a minute.

The Clerk: At 722.

Mr. Friebert: Thank you.

The Court: Now I will hear from you.

Mr. Strawn: Okay. The State would move that the indictment be amended to strike the words from Paragraph 16 of the indictment which are: "competition in the supply or price of an article or commodity which is the subject of" so that Paragraph 16 of the indictment—

The Court: Now just a minute. I've already got it written out here, so let me find where you are. All right.

Mr. Strawn: So that Paragraph 16 of the indictment now reads:—would now read: "commencing in the year 1970, the exact date being unknown to the Grand Jury"—

The Court: That was amended to November of 1971 by the court.

Mr. Strawn: Yes.

The Court: All right.

Mr. Strawn: "Commencing in the year 1971, the exact date being unknown to the Grand Jury, and continuing thereafter until at least February, 1973, in the County of Dane, in the State of Wisconsin, the defendants and co-conspirators named herein did feloniously engage in an unlawful combination and conspiracy intended to restrain trade or commerce in this state." That is the motion.

The Court: And Paragraph 17 which reads—Read 17.

Mr. Strawn: Paragraph 17 reads: "The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action between the defendants and co-conspirators to submit collusive, noncompetitive or rigged bids on solid waste removal to various public and private entities located in Dane County and to allocate solid waste removal jobs in Dane County among themselves."

The Court: Motion granted.

Mr. Friebert: Well, your Honor, may I register our objection to the amendment.

The Court: I know you object to everything and everything I rule on. It is understood that you have an objection to it.

Mr. Friebert: And, your Honor, I would like the Court or at least a statement as to the differences between indictments and informations. The district attorney or prosecutor has greater control over an information. It is his charge, and it follows a preliminary hearing, and therefore—

The Court: What did you say?

Mr. Friebert: And it follows a preliminary hearing.

The Court: What follows?

Mr. Friebert: An information.

The Court: Oh.

Mr. Friebert: Where there's been a prior judicial finding of probable cause. In an indictment a preliminary hearing is avoided, and what we are really substituting here where there is this kind of wholesale change is an information for an indictment because of the kind of amendment that is being made.

The Court: That is your interpretation.

Mr. Friebert: And therefore we ask for a preliminary hearing and move for a preliminary hearing.

The Court: Motion denied.

Mr. Hirschberg: Defendant Standridge joins in that motion.

The Court: Motion is denied.

Mr. Friebert: Then as we said we ask to be arraigned on the new charge.

The Court: Motion denied.

Mr. Hirschberg: Standridge joins in that.

The Court: The statute says that before trial the Court may order an amendment curing such defects. These are defects of form only. They do not relate to any substantial—any rights of the defendant. The defendant is most clearly informed under this indictment of precisely the charge pending.

(Mr. Friebert to supply Court with citation of case that says after an amendment to an information or indictment there is a right to be arraigned.)

(Amendment to Paragraph 16 will include the words "commencing in November of 1971.")

(Mr. Friebert and Mr. Hirschberg will now appear under a special appearance while the question of the arraignment is pending.)

(Mr. Strawn calls to the Court's attention the case of *State* v. *Nowakowski* which was upheld by the Supreme Court. Court instructs Mr. Strawn to give that to Mr. Friebert.)

Mr. Friebert: And also I will be moving orally and do it in writing that even as amended it doesn't state a crime as the language he takes out renders a document that does not allege a crime.

The Court: You may put that in writing. It will be overruled and I will follow what I have now decided. There comes a time when you write briefs that you have to make up your mind, and I did my own research. I found that that Law Review Article was most enlightening. I don't believe it was cited by the Attorney General, was it?

Mr. Strawn: It was not, Judge.

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, Ronald L. Zadra, Official Reporter for Dane County Circuit Court III, do hereby make certification that I reported the attached Excerpt of Proceedings on the 27th day of May, 1975, in Stenograph Shorthand, before the Hon. Norris Maloney, Circuit Judge, and that the attached transcript is a true and correct copy of my shorthand notes as typed by me.

Dated: May 27, 1975.

/s/ *Ronald L. Zadra*
Court Reporter